NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 07 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RUDOLPH ARNOLD EDWARDS, Defendant - Appellant.	No. 03-50373 DC No. CR 02-01192 SWK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Shirley Wohl Kram, District Judge, Presiding

Argued and Submitted November 1, 2004
Pasadena, California

Before: TASHIMA, FISHER, and TALLMAN, Circuit Judges.

Rudolph Edwards appeals his conviction of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(b), and his resulting 30-month sentence. Edwards argues that his conviction should be overturned because of limitations the trial judge placed on his cross-examination of the two arresting officers, the

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government's primary witnesses. Edwards also argues that the trial judge erroneously deemed him ineligible for a one-level downward departure based upon extraordinary childhood abuse. We affirm the conviction, but remand on the sentence.

During pretrial discovery, Edwards learned that the officers who arrested him, who would later be the government's primary witnesses, had both been convicted of driving under the influence of alcohol ("DUI"). Edwards also learned that one of the officers, when initially stopped before his arrest, had lied about the fact that he had been drinking. Before trial commenced, the government obtained an *in limine* ruling, precluding Edwards from questioning the officers about their convictions. Edwards claims this was error.

We review a district court's decision to limit cross-examination for abuse of discretion. *United States v. Shyrock*, 342 F.3d 948, 979-980 (9th Cir. 2003). We find no such abuse here. We agree with the government that the officers' misdemeanor DUI convictions are simply irrelevant to their credibility. *See* Fed. R. Evid. 609 (describing crimes that are admissible to attack the credibility of a witness); *see also United States v. Foster*, 227 F.3d 1096, 1099-1100 (9th Cir. 2000).

As to the false statement, while this court has previously recognized that prior false statements may have some relevance to a witness's credibility, *see United States v. Reid*, 634 F.2d 469, 473 (9th Cir. 1980), we cannot say that the district court abused its discretion in excluding the evidence in this case. The statement itself, made almost three years before the arrest when the officer was off-duty with impaired judgement, was of marginal relevance to the officer's credibility, at best. Yet admitting the statement almost certainly would have garnered a response from the government. *See* Fed. R. Evid. 608(b) ("[E]vidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked . . . ."). Given the risks of undue delay and confusion of the issues, we cannot say that the district court abused its discretion in these circumstances.[1] *Cf. United States v. Collins*, 90 F.3d 1420, 1429 (9th Cir. 1996) (holding that district court did not violate Confrontation Clause by refusing

[1] The dissent parts ways with our conclusion, arguing that the false statement should have been admitted because of the importance of the officer's testimony and his credibility. Neither of the cases the dissent relies upon, however, held that the district court abused its discretion by excluding prior false statements. *See Reid*, 634 F.2d at 470 (holding that the district court did not abuse its discretion by admitting a prior false statement); *United States v. Jackson*, 882 F.2d 1444, 1447-48 (9th Cir. 1989) (same). Further, in *Jackson*, we emphasized the deference that is due a trial court's evaluation of the evidence. *Jackson*, 882 F.2d at 1448 ("We refuse to disturb the trial court's assessment of the probative value of the evidence."). Thus, we must respectfully disagree with the dissent's conclusion that the district court abused its discretion by excluding the officer's false statement.

to allow the defense attorney to question a witness regarding a prior lie where lie was not relevant to the case).

Edwards also contests the 30-month sentence he received, arguing that the trial judge erred by finding him ineligible for a one-level downward departure due to extraordinary childhood abuse. *See United States v. Walter*, 256 F.3d 891 (9th Cir. 2001). The record establishes, however, that the trial judge understood her authority to depart, yet, in an exercise of discretion, declined to do so. We have held, post-*Booker*,[2] that "[b]ecause the district court appeared to be aware of its authority to depart downward, denial of [the defendant's] request is not reviewable." *United States v. Allen*, 425 F.3d 1231, 1236 (9th Cir. 2005) (citing pre-*Booker* case law).

Nonetheless, because, on this record, "it cannot be determined whether the judge would have imposed a materially different sentence had [she] known that the Guidelines are advisory rather than mandatory," *United States v. Ameline*, 409 F.3d 1073, 1083 (9th Cir. 2005) (en banc), we remand the sentence to the district court

[2] *United States v. Booker*, 125 S. Ct. 738 (2005).

for its reconsideration and possible re-sentencing in accordance with the procedures set forth in *Ameline*. *See id.* at 1084-85.[3]

For the foregoing reasons, we affirm Edwards' conviction and remand his sentence in accordance with *Ameline*.

AFFIRMED and **REMANDED**.

[3] From what we can discern from the record, Edwards has completed serving the imprisonment portion of his sentence and is now serving a term of supervised release. Nonetheless, out of an abundance of caution, we remand to the district court for a determination of whether Edwards should be resentenced. Consistent with *Ameline*, Edwards should be given an opportunity to "opt out" of resentencing if he so chooses. *Ameline*, 409 F.3d at 1084.